No. 10995

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

For reply to the brief of appellees, appellants first wish to point out several inaccuracies made in the statement of the case therein:

1. On page 2, the object which fell on claimant is described as an "electric light reflector shade." The record shows, however, that it was a glass composition indirect lighting globe (Tr. 58).

2. On pages 2 and 3, appellees state that claimant from January 12 to February 26, 1943, performed light duties at the office in an advisory capacity "for

a few hours a day." Claimant's testimony, however, was as follows:

> "After the first week I added on a half hour at a time, and a little more, *and the last three days I was out there I did stay practically the full time, the last three days.*"

3. On page 3, appellees state that hearings were held before the "Deputy Commissioner" on June 2 and June 30, 1943, and that, upon the evidence thus adduced, the "Deputy Commissioner" on November 29, 1943, filed his compensation order. The inference from such a statement is that there was only one Deputy Commissioner involved in the case, and that the one who made the order, heard the testimony. Such was not the case, however.

Reply to Appellees' Argument

The crux of appellants' case is not correctly stated by appellees on page 4. Rather, the true crux is

(1) Medical testimony was *necessary* in this case to establish causality; and

(2) The medical testimony introduced does not support the findings.

It is observed that appellees in their brief do not contend that the medical testimony supports the findings. Therefore, appellants consider Point 2, *supra*, to be conceded.

The only issue between the parties before this court, therefore, is Point 1, viz., whether in the type of disability involved herein (cerebral thrombosis), medical testimony was *necessary* to establish causation.

Appellees argue, on page 5, that no rule of law re-

quires the Deputy Commissioner to base his decision upon the testimony of any particular witness, since he is the sole judge of their credibility. We have no quarrel with the statement of the rule as such. Its application to the facts of this case, however, is challenged, since that point is not at issue herein.

In the first place, there is no *conflict* in the medical testimony as such. Nor is there any conflict in the non-medical testimony.

In the second place, the Deputy Commissioner who made the order, did not hear the witnesses, or face any of them. Therefore, how can it be said that he was either in a position to judge the credibility of witnesses, or that he alone has the exclusive province to pass on that issue? If the credibility of any witness is involved herein, this court is in exactly the same position to pass on that question as was the Deputy Commissioner whose order is under attack.

The argument is made on page 6, that the direct and circumstantial evidence is so strong in this case "as to leave it hardly likely that a *reasonable person* would conclude otherwise than did the Deputy Commissioner." The implication in that statement, of course, is that all of the medical experts who concluded "otherwise" are not "reasonable men." In fact, an attempt is made to belittle the opinions of the medical experts, by pointing out certain minor inaccuracies, to show that their opinions were based upon "misinformation." This subject will be discussed at a later point in this brief.

If the "direct and circumstantial" evidence in this case was so strong as to indicate only one conclusion

to a "reasonable person," how can we explain the fact that these same facts did not persuade the experts whose opinions were solicited to aid the Deputy Commissioner in arriving at his conclusion? Granted that two of the experts, Dr. Brown and Dr. Falconer, were of the insurance carrier's choosing, how explain that claimant's own personal physician, whom he selected at the outset, and who attended him during the period of both hospitalizations, stood unconvinced by the so-called direct and circumstantial evidence?

If the "common sense" possessed by laymen is to govern the conclusion to be reached on the medical question involved herein, why was it necessary to go to the trouble of obtaining the opinions of doctors in the first place? Deputy Commissioner Gray certainly did not think that the "common sense of the situation" was sufficient, otherwise, why did he say that he could only determine the question "on the basis of the advice that the doctors" gave to him? (Tr. 116).

On page 7, appellees state that the blow was diagnosed as "concussion of the brain," in order to establish the first link in the "common sense" situation rule. Compare, however, the actual testimony of Dr. Cloward, who described the blow as producing "no very extensive wound," and "no large bump, swelling or bruise or contusion," but only a "scratch." His diagnosis of concussion was "tentative" only, and made purely from the "story" and not from any objective finding (Tr. 99).

Appellees also say that "no intervening accident was shown" However, Dr. Cloward testified that the paralysis was due to an intervening "cerebral vascular

accident," arising separate and apart from the original injury (Tr. 112, 113).

On page 8, appellees argue that since the ultimate result was consistent with the kind of injury sustained, and that, since it was definitely not consistent with some other kind of injury, therefore, the presumption arising from the facts themselves would be sufficient to support the finding. The argument, however, begs the question, for the very point at issue is whether the paralysis was consistent with the type of injury sustained. It is surprising that if it was so simple for a layman to see consistency in the situation, that three eminent specialists could not likewise see the same.

To be consistent, from a medical standpoint, the paralysis would have manifested itself either immediately following the blow, or by a gradual awkwardness of the extremities (Tr. 111). *Claimant had neither manifestation during the intervening period.*

The doctors, at least, not only felt that the paralysis was *inconsistent* with the type of injury sustained, but that it was only *consistent* with a vascular disease and hypertension, entirely unconnected with the minor head injury received nearly three months previously.

Sec. 20 of the Longshoremen's Act (33 U.S.C.A. Sec. 920) is cited by appellees. From that, it is argued that the non-medical testimony spelled out a prima facie case in favor of claimant, and that, therefore, the burden shifted to the employer to establish that the claim did not come within the provisions of the act "by substantial evidence to the contrary." Contrary

to appellees' rather labored argument and tenuous reasoning that the medical testimony did not constitute "substantial evidence to the contrary," it is submitted that if the testimony of claimant's own attending physician, as well as of two other medical experts, is not "substantial evidence to the contrary," then the opinions of doctors based upon physical examination and observation, when made in support of the findings, should likewise be ignored. If they do not constitute substantial evidence in the former, they likewise do not constitute such evidence in the latter case.

It is submitted that the presumption created by Sec. 20 is not sufficient to sustain the award, for in this case, the opinions of the several doctors of non-causal relation is positive, direct and unequivocal, based upon personal observation and examination of the claimant himself. The injection of this argument on presumption is but to play with shadows, and reject substance.

Furthermore, by this reference, appellees are confusing the difference between the procedural burden of going forward with the evidence involved in hearings before the Deputy Commissioner, and that involved in a proceeding to review the order of the Commissioner before the court under Sec. 21(b) of the act. The cases cited by appellees on page 10 under Note 6, involve the latter.

As to proceedings before the Deputy Commissioner, the function of the statutory presumption and the effect thereof is clearly stated in *Indemnity Ins. Co.*

of North America v. Hoage (App. D.C. 1932) 58 F. (2d) 1074, at page 1075, as follows:

> "This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by *substantial evidence* that the injury arose out of and in the course of his employment. To determine whether or not the Commissioner's conclusions of law are correct, it is necessary for the court to ascertain whether they are supported by sufficient evidence. An order based upon insufficient evidence is an order contrary to law, and to determine this question a review of the evidence becomes essential." (Italics ours)

In other words, in proceedings before the Deputy Commissioner, the presumption that a claim comes within the provisions of the act, disappears as soon as substantial evidence to the contrary is introduced, and the burden of establishing the claim by substantial evidence is then reimposed upon claimant. Upon appeal to the court, the burden is upon the party attacking the order, to show that the findings are not supported by substantial evidence. The burden in the latter case, however, is merely one of *argument*, rather than *proof*, since no additional proof is heard or can be heard by the court.

Little space need be devoted to appellees' argument that "supported by evidence" as used by the Supreme Court in construing the Longshoremen's Act, does not mean "substantial evidence." The fact that any such distinction is attempted to be made, carries with it the implication that the evidence in

this case upon which the Deputy Commissioner based his finding was not "substantial," but merely "evidence."

On page 16, appellees say that the Deputy Commissioner had to consider the "credibility" of the witnesses, and had to weigh "conflicting" evidence. In the first place, as previously pointed out, the Deputy Commissioner faced none of the witnesses, so as to be in a position to judge their credibility from their demeanor, their candor or lack of candor, but had only the written record to predicate his findings upon. In the second place, the case is singularly free of "conflicting" evidence. There was no dispute as to the facts. There was no conflict among the medical experts. The only conflict is in the conclusion reached by a lay member of the United States Employees' Compensation Commission on the one hand, and members of the medical profession, on the other hand, upon what even appellees on page 12 admitted to be an "elusive" medical subject.

In attempting to break down the force of Dr. Cloward's testimony, appellees say on page 25 that he assumed as a fact that claimant was "perfectly well in the intervening period between his two periods of hospitalization, and that the paralysis developed out of a clear sky." The words "perfectly well," as used by Dr. Cloward in one stage of his testimony, should be read in conjunction with his statement immediately following, wherein he said:

> "Between Mr. Piatt's discharge from the hospital and his second admission, from a *neurological* standpoint he was perfectly normal."

His statement that the paralysis developed "out of a clear sky" is certainly accurate, since there is no shred of evidence in the record to show that claimant suffered from any symptoms of paralysis in the intervening period.

Also, on page 25, the statement is made that Dr. Cloward testified that claimant "didn't complain of headaches, appreciable dizzy spells, or things of that sort."

Through inadvertence, undoubtedly, the first comma in the above quotation was misplaced, which gives an entirely different meaning to the testimony. The record does not show any comma after the word "headaches," so as to make the word "appreciable" modify "dizzy spells." Instead, the comma appears after the word "appreciable," so as to qualify the word "headaches." In other words, his testimony was that claimant did not complain to him of appreciable headaches or dizzy spells.

Appellees overstate the record on page 26, when they say the evidence after his discharge from the hospital on December 24, 1942, up to the time of his paralysis on February 26, 1943, "shows a history of continual headaches, weakness and *dizziness.*" Reference to each page of the record cited in support of that statement, fails to reveal any mention of "dizziness," except in one instance, on page 36 of the record, which concerned the after-effects immediately following the original blow on December 1 and December 2. There is not one iota of evidence concerning dizzy spells after that date.

The attempt, likewise, is made to discredit the tes-

timony of Dr. Brown and Dr. Falconer, by showing that their opinions were based upon several matters of "misinformation." The inference being that, if these doctors had not been so misinformed, their opinions might have been more favorable.

As we read the opinions of the doctors, they are not predicated upon the vagaries of claimant's blood pressure readings, but upon three essential factors:

(1) The original injury to the head was slight, with no evidence of fracture, and produced no loss of consciousness;

(2) The length of time that elapsed following the blow before paralysis manifested itself for the first time; and

(3) The suddeness of the onset of paralysis without any intervening awkwardness in the use of his extremities.

Whether the blood pressure reading on the first admission to the hospital was 230/140, rather than 240/110, or whether claimant was feeling "*fairly* well" in the interim, or whether claimant's blood pressure upon the second admission to the hospital was 170/110, rather than 200, would certainly not have altered the ultimate conclusion one whit on the part of Dr. Brown.

Likewise, so far as Dr. Falconer is concerned, his opinion would not have been any different if he knew that claimant's blood pressure during the first period of hospitalization was 230 to 140, rather than 170 to 190, or that his blood pressure on the second admission was 170/110, rather than 200, or that claimant was discharged on May 5, 1943, rather than March 27, 1943, since none of these factors would have changed

the fundamental basis upon which his conclusions were based.

On page 27, appellees argue that the record discloses a situation of "continuing disability" during the intervening period. What, may we ask, was the nature of the so-called continuing disability? *It certaing was not in the use and motion of his arms or legs, which was the disability that occurred for the first time on February 26.* Furthermore, claimant returned to work January 12, 1943, and continued until Frebruary 26, 1943, albeit for three hours per day the first week, and thereafter a half hour more each day, until working full time the last three days preceding his collapse. How can it be said, therefore, that he suffered from a "continuing disability" during the entire intervening period?

On page 28, appellees say that "when an accident results in immediate injury and disability, such as head injury, and there then ensues a series of related complaints, such as headaches and *dizziness* of a substantially continuing nature, persisting until the employee is obliged to stop work," medical testimony is not necessary to establish casual connection.

The vice in such an argument is that it assumes facts not present here. In the first place, there was no evidence of *dizziness* suffered by claimant except on the day of his injury and on the day following. In the second place, the headaches, as such, did not oblige the employee to stop work. The event that caused a termination of the employment, was an altogether different type of disability, than that suffered

by claimant from December 1, 1942, to January 12, 1943.

Cited is *Wroten v. Woodley Petroleum Co.* (La. 1929) 124 So. 542. There, the employee injured his side when he fell from a height of eight feet onto a metal object. The fall produced immediate disability, for which the employer paid compensation for a period of about six weeks. The issue involved was whether his subsequent disability was due to the injury, or to arthritis. There were a number of physicians called, and *all of them stated that the disease could have been caused by the trauma.* In the present case, not one single doctor testified that the cerebral thrombosis could have been caused by the original blow.

Jarka Corp. v. Norton (D.C. Pa. 1930) 56 F.(2d) 287, cited on page 28, has already been discussed on appellants' opening brief (page 33).

The syllabus quoted from the case of *Dinoni v. Vulcan Coal Co.* (Kan. 1931) 297 Pac. 721, cited on page 29, should be read in the light of the peculiar facts presented in that case. There an employee injured his knee, causing infection. Later, while walking in his home, with the use of a cane, he slipped and fell, striking the same knee against a chair, fracturing the kneecap. This was followed by an operation in which the fractured parts were wired together, and protracted and serious infection ensued. A physician testified that he believed the infection following the operation developed from the previous infected condition of the leg. The court, however, said that the facts of the second fall, the fractured kneecap, the difficult operation in wiring the broken parts together, and the

great danger of infection, all in effect contradicted and raised an issue as to whether the infection developed from the infected condition of the leg from the first injury. Furthermore, that, in order for there to be a causal connection between the original injury and the later condition, it must have been so naturally, without any intervening incident or the result of a necessary course on account of the original injury.

Thus, it will be seen that *two* separate accidents were sustained by the employee. Infection to the knee could have been caused as a result of either one. It was anybody's guess as to whether the infection arising from the second accident was attributable to the first. Such a question was not exclusively within the province of the doctor to determine.

The quotation from *Utah Delaware Mining Co. v. Ind. Comm.* (Utah 1930) 289 Pac. 94, omits a very important statement of the court, which, of itself, distinguishes the case from the facts involved herein. A portion of the part omitted reads as follows:

> "That at the time of the accident the applicant was injured rather severely in the region of the right kidney, is not disputed. *No opiniion was advanced,* and *no reason given by the physicians,* that if the diseased and infectuous condition of the kidney and of the gall bladder and the adhesions were not attributable to the injury received at the time of the accident, *to what likely or probable cause or causes they were attributable.*" (Italics ours)

Here, not only was an opinion advanced, and reasons given by the physicians, that the subsequent

paralysis was not attributable to the injury received, but a full explanation was given as to its probable cause.

Furthermore, it would seem that a causal connection could have been found there without the aid of medical testimony.

In any event, these two state cases were decided approximately fifteen years ago. Medical science has made considerable progress in the interim, so that even in the forward-looking states of Kansas and Utah, the opinions of medical experts on questions involving the pathological cause of physical ailments, might now be accorded more respect than was given them in 1930 and 1931.

On page 30, the statement is made that the Deputy Commissioner is not bound to accept the opinion of theory of any particular medical examiner. That is correct, but that rule assumes that there are several medical examiners testifying who differ in their opinions. Here, there was no conflict among the doctors.

It is also said that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. Cited in support thereof is the recent case of *Contractors PNAB v. Pillsbury*, No. 10, 950, recently decided by this court. The question involved therein was whether the contraction of pulmonary tuberculosis was due to working conditions. One physician actually testified that the disease could have developed since March, 1942, the commencement date of the employment. Another physician gave as his opinion that the employee suffered from a reactivated type of tuberculosis. A certain document

from an officer of the Navy Medical Corps confirmed the testimony of the claimant that he was free of tuberculosis before he left the mainland to work on the project.

It will, therefore, appear that there was ample medical evidence to sustain the finding.

Each of the other cases cited in support thereof, appearing in footnote 10 on page 31, with the exception of *Liberty Mut. Ins. Co. v. Marshall* (D.C. Wn. 1944), which is the opinion of the lower court herein from which this appeal is prosecuted, are fully discussed in appellants opening brief, and hence further comment thereon would be needless repetition.

The same may be said of *Frank Marra Co., Inc., v. Norton* (D.C. Pa. 1931) 56 F.(2d) 246; *So. Steamship Co. v. Norton* (D.C. Pa. 1941) 41 F. Supp. 108, and *McNeelly v. Sheppeard* (C.C.A. 5, 1937) 89 F. (2d) 956.

Liberty Mut. Ins. Co. v. Williams (Ga. 1932) 161 S.E. 853, can be distinguished as falling within that group of cases where the disability is so immediate and severe following the injury, that laymen in ordinary walks of life can infer cause from effect. There, also, the disability grew *progressively worse* following the original severe injury. Here, the condition of claimant progressively *improved* to such an extent that for three days preceding his sudden paralysis, he was able to work full time.

Associated Gen. Contractors v. Cardillo (App. D.C. 1939) 106 F.(2d) 327, was supported by medical testimony that the fatal hemorrhage resulted from

trauma, and, therefore, aids, rather than hinders, appellants in their position herein.

Independent Pier Co. v. Norton (C.C.A. 3, 1931) 54 F.(2d) 734, is likewise inapposite, since it did not involve the issue of casualty, but the question of continuing disability from an injured knee that had already been the subject of a compensation award.

Kemp v. Pittsburgh Terminal Coal Corp. (Pa. 1938) 3 Atl.(2d) 34, a decision by the Superior Court, cited on page 35, certainly does not support the position of appellee. There, the condition causing cessation of work was severe *headaches*, not *paralysis*. The original blow was so severe as to render the employee *unconscious*. He also suffered from *dizziness* thereafter, and had trouble with his eyes. When he was examined by a doctor, nine months later, he was unable to respond to the directions to undress. His blood vessels appeared normal, and there was no evidence of arteriorsclerosis. The doctor's conclusion was that "a concussion developed at the time of his injury, and that his personality changes that were reported by his family were the result of that injury." None of those elements are present in the case at bar. Furthermore, as the court pointed out, the connection between the injury and the disability that followed was not remote, but so direct and natural that the award did not depend solely upon the testimony of the professional witnesses.

In *Southern Cement Co. v. Walthall* (Ala. 1928) 117 So. 17, cited at page 37, the "other testimony" referred to in the quotation, consisted of a statement made by a doctor on cross-examination to the effect

that the blow might have been a *contributing cause* of the brain hemorrhage and resulting death, and of another doctor's statement that in his best judgment the blow was the cause, or a contributing cause to the paralysis. No such "other evidence" is present in the case at bar.

M. P. Moller Motor Car. Co. v. Unger (Md. 1934) 170 Atl. 777, cited at page 37, recognizes the rule that medical testimony is not required in those cases where by other evidence facts are shown which fairly and logically tend to prove that the accident was the efficient cause of the condition complained of. There, within a week following the head blow, the employee began showing symptoms of paralysis, by having trouble with his speech and his walk. He stopped working altogether about a month after the blow, took to his bed, *getting worse all the time*, until his death about three months following his injury. His attending physician stated that the accident could have been the cause of the illness which he found, *and that he knew of no intervening cause.*

This, therefore, is a case where the medical testimony was not altogether negative, and not necessarily required, since a layman in the ordinary walk of life could infer cause and effect from the facts.

Pierron v. Prudential Ins. Co. (Ohio 1941) 30 N. E.(2d) 563, is a case wherein there is medical testimony of possibility, coupled with evidence of disability immediately following the injury. Both were held sufficient for the award. The court recognized, however, that some of the afflictions from which plaintiff

suffered could not be said to be the result of the fall, without the aid of expert testimony.

To argue as appellees do on page 39, that the Deputy Commissioner did not find that the injury was the cause, proximate or otherwise, of the cerebral thrombosis, but merely found that claimant was disabled as a result of the injury, is to ignore the true meaning of the finding that "*as a result of the said injury*, the claimant was wholly disabled from December 1, 1942, to and including January 10, 1943, and from February 26, 1943, to and including November 18, 1943 * * * and that on November 19, 1943, the total disability of the claimant *resulting from the said injury* continued."

Certainly, it must be conceded that the type of disability suffered from February 26 on was altogether different than the type suffered between December 1 and January 10. Hence, a finding that his disability on and after February 26 was the "result" of the injury sustained is, in effect, a finding that there was a causal connection between the two events.

Throughout appellees brief, and particularly on pages 40 and 41, the impression sought to be conveyed is that the disability of claimant was *continuous* from December 1, 1942, on. Thus, it is said on page 40, that even assuming arguendo that the cerebral thrombosis did not result from the injury, but merely added to the disability, the employer would not be relieved of liability for the disability that existed on February 26, since liability for disability from the first cause continued and, on page 41, the statement is made that if the Deputy Commissioner had found that claimant's

disability resulting from the injury on December 1 had terminated prior to February 26, the date of the paralysis, the finding would have been contrary to the uncontradicted evidence of claimant, his wife and all his business associates.

Yet, did not the Deputy Commissioner actually find that claimant was only "disabled" from December 1 to January 10, and from February 26 on? Does not such a finding necessarily hold that he was not "disabled" between January 10 and February 26?

There is, therefore, a clearly recognized gap in the two periods of disability, and the evidence is clear that the "disability" suffered during the first period was of an altogether different nature than that suffered during the second period. How, then, can it be said that an intervening disease was merely superimposed upon a "compensable disability then existing"?

This should certainly distinguish the facts from those involved in *Bernatowitz v. Nacirema Operating Co.* (C.C.A. 3, 1944) 142 F.(2d) 385, cited at page 40.

In attempting to distinguish *Burton v. Holden & M. Lbr. Co.* (Vt. 1941) 20 A.(2d) 99, and *Pac. Employers Ins. Co. v. Ind. Acc. Comm.* (Cal. 1941) 118 P.(2d) 334, appellees again refer to the claimants injury as a *serious* wound on the head. Yet, his own attending physician called it merely a "scratch," and it was conceded that the blow was not serious enough to produce unconsciousness or a fracture of the skull. Also, appellees refer to persistent *dizziness*, which the record does not bear out.

It is submitted that the attempted distinction of

these two cases is invalid, and that they squarely support appellants' contention as to the necessity of medical evidence to establish causality in those cases where the subsequent disability does not flow so directly and naturally from the original injury as to be within the knowledge of laymen to pass upon.

CONCLUSION

Full opportunity is afforded claimants under the Longshoremen's Act to introduce medical testimony to establish causality, in those cases where the ultimate disability does not follow the original injury so naturally and immediately as to be within the common knowledge of laymen. If a claimant does not produce such testimony, or if the doctor that he does produce, does not support his contention, then sound logic demands that the Deputy Commissioner should not be permitted to speculate on the subject, or to ignore the uncontradicted testimony of medical experts who say that there is no connection whatsoever between the original injury and the subsequent ultimate disability. To hold otherwise, affords the employer no protection whatsoever, since it places him in the arbitrary power of the Deputy Commissioner, who, under the law, is directed to construe the act liberally in favor of the employee, and to give him the benefit of any doubt.

Respectfully submitted,

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